Filed 4/22/19 2H Construction, Inc. v. Artists worldwide, Inc. CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| 2H CONSTRUCTION, INC., a California Corporation,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ARTISTS WORLDWIDE, INC., a California Corporation,<br><br>Defendant and Appellant. | B286887<br><br>(Los Angeles County Super. Ct. No. NC060947) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Law Offices of Cole Sheridan and Cole Sheridan for Defendant and Appellant.

Krieger & Krieger, Lawrence R. Cagney and Terrence B. Krieger for Plaintiff and Respondent.

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Artists Worldwide, Inc. (AWW) appeals a default judgment entered against it for $61,351.04 after the trial court denied its motion to vacate default. AWW's motion was based on its CEO's claim that AWW had never been served with the summons and complaint. The trial court found that plaintiff 2H Construction, Inc. had effected service on AWW, and denied the motion to vacate. On appeal, AWW takes a different tack, arguing that service was invalid because it did not comply with various statutory requirements. To the extent we can reach these arguments, which are raised for the first time on appeal, we find them without merit. We affirm.

***FACTUAL AND PROCEDURAL BACKGROUND***

In December 2016, 2H Construction filed a complaint for breach of contract, fraud and negligent misrepresentation against AWW and others. On March 17, 2017, default was entered against AWW.

In July 2017, AWW moved to vacate the default arguing, among other things, that it "was never served with any summons and/or complaint." In support of this claim, AWW submitted the declaration of its CEO, Chris Majors. Majors stated that he had never been served with the summons, and "to the best of my current knowledge, no authorized agent for AWW was ever served." Majors further "confirmed" that "AWW was never served or otherwise received a copy of any summons and/or complaint" in this matter. In opposition, 2H Construction presented evidence that a process server had left a copy of the summons and complaint with AWW's office manager at AWW's usual place of business. The process server had thereafter mailed the documents to the same address.

In August 2017, the court issued a tentative ruling denying the motion, finding that AWW had been properly served. The court observed that Majors's statement that " 'to his knowledge' no authorized agent was served" "does not controvert the proof of service. The authorized agent was sub-served." The court indicated it was "inclined to deny the motion due to the problems with the supporting declaration."

After hearing argument, the court denied the motion. In October 2017, the court held a default prove-up hearing, and later entered judgment against AWW for $61,351.04. AWW timely appealed.

## *DISCUSSION*

In the trial court, AWW argued that the court lacked personal jurisdiction over AWW because 2H Construction had never served AWW with the summons and complaint. On appeal, AWW takes a different approach. Now, AWW argues for the first time that service was inadequate for four reasons: (1) 2H Construction did not establish that an authorized agent of AWW accepted service (Code Civ. Proc., § 416.10),[1] (2) the summons did not contain notice that service was on behalf of AWW (§ 412.30), (3) 2H Construction did not file an affidavit stating that it had sent AWW a copy of its application for entry of default (§ 587), and (4) 2H Construction's proof of service did not state that it had mailed the summons to the person who was served (§ 415.20).

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[1] All further statutory references are to the Code of Civil Procedure.

We first discuss AWW's failure to provide a complete record on appeal, and then address each contention in turn.[2]

**A. The Lack of a Reporter's Transcript**

On June 5, 2018, we sent a letter to counsel directing the parties to address in their briefs the issue of whether AWW's failure to provide a reporter's transcript or suitable substitute of the relevant hearings warrants affirmance based on the inadequacy of the record. AWW did not address this issue in its opening brief, and it did not file a reply.

The primary drawback of an inadequate record is that it makes it difficult for the appellant to meet its burden of affirmatively demonstrating error by the trial court. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183.) "Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done but rightly done." (*Steuri v. Junkin* (1938) 27 Cal.App.2d 758, 760.)

AWW's appeal challenges the trial court's denial of its motion to set aside the default and implied finding that AWW was properly served with the summons. In such a case, the

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[2] Some of the points were raised in a supplemental declaration of AWW's counsel filed on the day of the hearing on the motion to vacate. The trial court wrote on the declaration "8-24-17 Not requested by court. Not authorized by statute. Not read or considered by court in its ruling. R. Klein [trial judge]." Counsel's declaration reflects that he learned of the facts supporting his declaration on June 1, 2017, two and a half months before he filed his declaration. In the court's handwritten comments, it essentially struck the declaration. On appeal, AWW does not claim as error the striking of the declaration. Accordingly, we ignore this document.

" 'scope of appellate review . . . is limited to a determination as to whether there was sufficient evidence, in the form of allegations in the supporting affidavits, to support the order made by the trial court. An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify.' [Citation.]" (*Byrnes v. Johnson* (1956) 138 Cal.App.2d 443, 446.)

Without a record of the oral proceedings, we cannot evaluate any reference to evidence or other argument that may have been presented at the hearing. We opt in this case to confine our review to the documentary evidence properly presented in supporting declarations, and determine whether it was sufficient to support the court's implied finding that service was proper. We conclude based on the limited record provided on appeal, that AWW has not demonstrated any trial court error.

**B. 2H Construction Served an Authorized Agent**

AWW's first argument is that 2H Construction is "unable" to show that the person served with the summons "had the requisite agency or authority to accept service of process on behalf of" AWW as required by section 416.10.[3] AWW further

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[3] Section 416.10 provides in part:

"A summons may be served on a corporation by delivering a copy of the summons and the complaint by any of the following methods:

"(a) To the person designated as agent for service of process as provided by any provision in Section 202, 1502, 2105, or 2107 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code, as in

contends the evidence established the summons was not served at its business and mailing address.

We begin our analysis with the Judicial Council-approved form proof of service that 2H Construction filed with the trial court. Paragraph 3 states that the "*Party served*" was AWW and the "*person served*: CHRIS MAGGIORE, AGENT." AWW does not dispute that Maggiore was its agent for service of process; on the contrary it points to the records of the California Secretary of State for that proposition.

The proof of service next states that AWW was served at "3660 WILSHIRE BLVD., LOS ANGELES, CA 90010." AWW argues that the California Secretary of State's Office "identifies" a different address "as the business and mailing address" for AWW. However, the process server's declaration states that AWW's address as listed by the Secretary of State was a "vacant suite." 2H Construction provided evidence to the trial court that the process server delivered the summons to the address listed on AWW's website.

The proof of service next contains a section setting forth the specifics of the service:

"*I served the party:*

'**b. by substituted service**. On: Tue, Jan 17, 2017 at 1:40PM by leaving the copies with or in the presence of JANE

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effect on December 31, 1976, with respect to corporations to which they remain applicable).

"(b) To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process."

DOE, PERSON IN CHARGE. White. Female. 38 Years Old. Red Hair. Brown Eyes. 5 Feet 8 Inches. 135 Pounds.' [All type font variations in the original.]"

AWW contends that this method of service was ineffective for two reasons. One, there was no showing that Jane Doe acted in any of the capacities listed in section 416.10 for acceptance of service, and two, that there was an insufficient proof of mailing.

The first argument overlooks the role another statute, section 415.20, plays in effecting service. Section 415.20 provides distinct substituted service rules depending on the legal status of the party to be served. The present case is governed by subdivision (a) which expressly applies to service on a corporation under section 416.10. Under subdivision (a) the summons and complaint may be served by leaving a copy at the person's place of business "with the person who is apparently in charge thereof." This form of substituted service is apparently what the trial court had in mind when it found that the "agent, by whatever name given, *was sub-served* through Jane Doe." (Italics added.)

As appears from the filed proof of service, 2H Construction served AWW through its authorized agent (Maggiore) by substituted service on Jane Doe, the person apparently in charge of Maggiore's office. To the extent AWW argues that Jane Doe was not the person in charge, the trial court made a contrary factual finding, one which we are not entitled to ignore on appeal. (See *People v. Middleton* (2005) 131 Cal.App.4th 732, 738 ["If factual findings are unclear, the appellate court must infer 'a finding of fact favorable to the prevailing party on each ground or theory underlying the motion.' "]; *Heron Bay Homeowners Assn. v. City of San Leandro* (2016) 19 Cal.App.5th 376 [all

intendments and presumptions are indulged to support the judgment].)

Likewise, to the extent AWW argues that the summons was not served at its address as listed by the California Secretary of State, we must presume the trial court accepted the contrary evidence before it: that the address listed by the Secretary of State was a vacant suite, and that AWW was served at its actual business address as identified on its website. Any uncertainty on this point might have been resolved by the reporter's transcript which was not part of the appellate record.

### C. 2H Construction's Compliance with the Section 415.20 Mailing Requirement

The second part of AWW's defective service argument is that there is insufficient evidence that, after the substituted service, 2H Construction mailed a copy of the proof of service as required by section 415.20. AWW claims that even if Jane Doe was in charge of the office at the time of service, 2H Construction did not comply with that part of the statute which requires mailing of the summons and complaint "to the person to be served."

Section 415.20 permits substituted service on a corporation by a person apparently in charge of a corporate agent's office but only when the summons is thereafter mailed "to the person to be served at the place where a copy of the summons and complaint were left." (§ 415.20, subd. (a).) AWW argues that when 2H Construction mailed copies of the summons and complaint to AWW, 2H Construction did not address the envelope to the "person to be served" but rather, to AWW itself. Once again, we are faced with disputed facts, and AWW's failure to assert the

point below. (See *City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 812 (*Sasse*).)

In raising this argument for the first time on appeal, AWW cites to the process server's affidavit in which he states that he mailed a "copy of Documents to: ARTISTS WORLDWIDE, A CALIFORNIA CORPORATION." AWW ignores the process server's contrary declaration in the proof of service which states that he served Chris Maggiore, and mailed "copies of the documents to the person to be served."

Even if we were to consider the declaration that the trial court struck, the record is ambiguous as to whether the process server addressed the mailing to AWW or Chris Maggiore, the person to be served. We cannot resolve on appeal this disputed fact which the trial court at least impliedly found in 2H Construction's favor.

**D. 2H Construction's Compliance with Section 412.30**

AWW argues that the summons did not contain notice disclosing that AWW's office manager was being served on behalf of AWW as required by section 412.30. We conclude the record is inadequate for us to consider this issue, which also involves disputed facts. (See *Sasse*, *supra*, 9 Cal.App.3d at p. 812.)

Section 412.30 provides that a copy of a summons served on a corporation shall contain notice that the person served is being served on behalf of the corporation. In support of its claim that the summons served on AWW did not contain this required notice, AWW only cites to its counsel's declaration which purports to attach a copy of the summons served on AWW. That summons does not include the notice required by section 412.30. As we observed, the trial court struck the declaration as unauthorized and we ignore it. More to the point, 2H Construction's proof of

service states that the process server served AWW with a copy of the summons that provided the following required notice: " 'Notice to the Person Served' (on the Summons) was completed as follows: on behalf of: ARTISTS WORLDWIDE, A CALIFORNIA CORPORATION Under CCP 416.10 (corporation)."

As the issue was not raised below, the trial court made no express finding on this point. We accept the implied finding in favor of 2H Construction.

**E. The Sufficiency of the Request for Entry of Default**

AWW contends that the request for entry of default does not include a declaration it was mailed to AWW in compliance with section 587.[4] The record refutes this contention: the "declaration of mailing" states that this request was mailed to "ARTISTS WORLDWIDE" at its business address on March 16, 2017.

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[4] Section 587 provides: "An application by a plaintiff for entry of default under subdivision (a), (b), or (c) of Section 585 or Section 586 shall include an affidavit stating that a copy of the application has been mailed to the defendant's attorney of record or, if none, to the defendant at his or her last known address and the date on which the copy was mailed. If no such address of the defendant is known to the plaintiff or plaintiff's attorney, the affidavit shall state that fact. [¶] No default under subdivision (a), (b), or (c) of Section 585 or Section 586 shall be entered, unless the affidavit is filed. The nonreceipt of the notice shall not invalidate or constitute ground for setting aside any judgment."

## *DISPOSITION*

The judgment is affirmed. 2H Construction is awarded its costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.